Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 405.

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BRIEF FOR APPELLANT.

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Counsel for Appellant.

[redacted]

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 405.

AMERICAN EXPRESS COMPANY, *Appellant*,

vs.

UNITED STATES, *Defendant*.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

This is one of five suits brought in the circuit court at the same time, and all substantially alike, to enjoin the defendants, who are express companies, from issuing franks for the free transportation of express packages to their officers and employes, and members of their families, or to the officers and employes of other express companies and transportation companies, or members of their families, on the claim that such free transportation is forbidden by the Interstate Commerce Act, as amended June 29, 1906,

and by the Elkins Act. The material sections of both acts are printed as an appendix to this brief.

The case was tried upon the petition, answer, replication and stipulation of facts, and resulted in a decree, entered April 24, 1908, enjoining the appellant, who was defendant below, from "issuing any frank or other document for the free transportation of property to the following persons, to-wit: the officers, agents, attorneys, and employes of said defendant and their respective families; the officers and employes of other express companies and their respective families; the officers and employes of any railroad or any other common carrier subject to the Act to Regulate Commerce and its amendments, and their respective families; or to any of said persons; and from transporting and forwarding for said persons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said Interstate Commerce Act and its amendments." (R. 31.)

In allowing an appeal to this court, the circuit court (R. 33) suspended the injunction awarded by its decree until December 1, 1908, or the further order of this court, provided the appellant should file the transcript on appeal in this court within thirty days, a condition which was complied with.

The stipulation of facts shows that appellant did not issue passes except to its own officers and employes, and members of their families, and to the officers and employes of other express companies and transportation companies and members of their families, in exchange for passes issued by the latter to officers and employes of appellant. All passes so issued provided that they should not be used for business packages, or for the transportation of extra heavy weight, money, bonds, jewelry or live stock, but only for the

personal packages of the holder, and they required him to assume all risk of loss or damage from whatever cause, to the property carried. See form of franks and passes given as exhibits, following page 16 of the Record.

ASSIGNMENT OF ERRORS.

The formal assignment of errors filed in the circuit court is found at page 32 of the Record. The assignments may be summarized in the claim that the circuit court erred in construing the Interstate Commerce Act as prohibiting express companies from giving passes for the transportation of personal packages to their officers and employes and members of their families, and to the officers and employes of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies. If the Interstate Commerce Act does not forbid the giving of such passes, the circuit court erred in not dismissing the petition, because there was no evidence that appellant issued passes to any other classes of persons, or of any other kind.

ARGUMENT.

I.

It is a matter of common knowledge, and shown also by the stipulation of facts, that the custom of express companies to issue such passes was one of long standing and presumably known to Congress. There is no record of any protest against it to or by the Interstate Commerce Commission, or to Congress, nor any suggestion in any speech or report that it was supposed to be detrimental to the public interest, or that it was intended to be prohibited. There is no direct or express prohibition in the statute. On the contrary, the Interstate Commerce Act recognizes, and

always has recognized that the granting of similar privileges to the officers and employes of railroad companies is consistent with sound public policy. Section 22 has always provided that nothing in the act "shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes." And section 1, as amended June 29, 1906, expressly exempts the officers and employes of common carriers and their families, from the prohibition against free passenger transportation, and declares further that the provision "shall not be construed to prohibit the interchange of passes for the officers, agents and employes of ***common carriers*** and their families." The same section declares that "the term 'common carrier' as used in this Act, shall include express companies."

The reason for making these exemptions in favor of the employes of common carriers, and members of their families, is obvious. It is adverted to in Steamboat New World vs. King, 16 How. 469, 473, where Mr. Justice Curtis, referring to the custom of steamboats to carry steamboat-men free, said:

"It is proved that the custom thus to receive steamboatmen is general. The owners must therefore be taken to have known it, and to have acquiesced in it, inasmuch as they did not forbid the master to conform to it, and the fair presumption is, that the custom is one beneficial to themselves. Any privilege generally accorded to persons in a particular employment, tends to render that employment more desirable, and of course to enable the employer more easily and cheaply to obtain men to supply his wants."

Congress doubtless considered that the granting of such privileges to the employes of transportation companies would

not affect commerce injuriously, but on the contrary would promote the efficiency and economy of the service and in that way benefit the public indirectly. It is an arduous service, and in some departments hazardous, and takes men away from their homes and families. The small privileges which employes passes give costs the public nothing, and the companies little, in comparison with the good feeling which it promotes between employer and employe, and the esprit de corps that it develops among the men themselves. In the language of Mr. Justice Curtis it "renders the employment more desirable" and "enables the employer more easily and cheaply to obtain men to supply his wants."

The interchange of passes between the express companies and railroad companies is important to both. The stipulation of facts and the more detailed description of the express business given by Chief Justice Waite in the Express Cases, 117 U. S. 1, and by Mr. Justice Shiras in Baltimore & Ohio Southwestern Railway Company vs. Voigt, 176 U. S. 498, show the intimate relations between the express companies and the railroad companies in the daily conduct of their business, and the importance to both of the friendly co-operation and mutual good-will of their officers and employes, which the interchange of personal passes tends to promote. The Chief Justice refers to "the varying details of a business which is to be adjusted between two public servants so that each can perform in the best manner its own particular duties" (117 U. S. 24), and Mr. Justice Shiras calls the relation between the railroads and the express companies "to a certain extent a sort of partnership relation between them in carrying on a common carrier business." 176 U. S. 511.

II.

In the circuit court, the Government claimed that the provision of section 1 for "the interchange of passes for the officers, agents, and employes of common carriers, and their families," relates only to passenger passes, because it is in the form of a proviso to a provision which deals only with free transportation of passengers. It is true that the usual office of a proviso is to qualify the generality of that which precedes and to exclude from its operation that which would otherwise be included, but it is often used for another purpose, and in this case was evidently used as an introduction to an amendment offered after the bill was reported, for the purpose of extending the privilege of interchanging employes passes to all common carriers subject to the act.

If that was not its purpose it was unnecessary, for section 22 already covered the case of "railroad companies" and allowed them to give passes "to their own officers and employes" and to exchange passes "with other railroad companies for their officers and employes." When section 22 was adopted express companies were not subject to the act (88 Fed. 659). They and sleeping car companies were brought in by the amendments of June 29, 1906, and the evident purpose of the sentence following the word "provided" in section 1 was to extend to them the privilege of giving and exchanging passes already accorded to railroad companies by section 22.

If the purpose of the proviso was not to enlarge section 22, but only to make it plain that the interchanging of railroad passes, allowed by section 22, was not intended to be affected by the amendments of June 29, 1906, the proviso would have read as follows:

"Provided, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents and employes of *railroad companies* [instead of common carriers] and their families."

Concerning the office of a proviso we call the attention of the court to the following cases:

In Georgia Banking Co. vs. Smith, 128 U. S. 174, 181, Mr. Justice Field said:

"The general purpose of a proviso, as is well known, is to except the clause covered by it from the general provisions of a statute, or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them, to precede their proposed amendments with the term 'provided,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater signification than would be attached to the conjunction 'but' or 'and' in the same place, and simply serving to separate or distinguish the different paragraphs or sentences."

In Interstate Commerce Commission vs. Baird, 194 U. S. 25, 36, 37, the foregoing passage is quoted with approval, and the principle applied to a proviso in section 3 of the Elkins Act. Mr. Justice Day said:

"It is true that the office of a proviso, strictly considered, is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. Minis vs. United States, 15 Pet. 423; Austin vs. United States, 155 U. S. 417, 431; White vs. United States, 191 U. S. 545, 551. It is apparent that this proviso [in section 3 of the Elkins Act] was not inserted in any restrictive sense or to make clear that which might be doubtful from the general language used. It was inserted for the purpose of enlarging the operation of the statute so as to include a class of cases not otherwise within the operation of the section. It may be admitted that this use of a proviso is not in accord with the technical meaning of the term or the office of such part of a statute when properly used. But it is nevertheless a frequent use of the proviso in Federal legislation to introduce, as in the present case, new matter extending rather than limiting or explaining that which has gone before.

In Chesapeake & Potomac Tel. Co. vs. Manning, 186 U. S. 238, 242, the subject was under consideration, and Mr. Justice Brewer, delivering the opinion, while recognizing the restrictive office of a proviso as stated by Mr. Justice Story in Minis vs. United States, 15 Pet. 423, 445, added: 'While this is the general effect of a proviso, yet in practice it is not always so limited.' "

In Baggaley vs. Pittsburg & Lake Superior Iron Co. 90 Fed. 636, Lurton, C. J., said, p. 638:

"We are not unmindful that the ordinary office of a proviso is to except out of an act that which would otherwise be included. But this rule must not be carried too far. Such clauses are often introduced from excessive caution and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act."

In construing the proviso, it is well to remember that it was put into the bill prior to the time when the provision including express companies was inserted. When it was put in, two kinds of passes were known and issued by common carriers, namely, railroad passenger passes and express passes. The proviso was inserted in contemplation of these two kinds of passes and of the well-known custom of interchanging them. And when Congress, in contemplation of that custom, said that the provision should not be construed to prohibit the interchange of passes for the officers, agents and employes of *common carriers* and their families, it meant to say, among other things, that railroads should not be prohibited from interchanging passes with express companies, as they had always done. When, later, in the Congressional proceedings, the Senate amended the act by inserting the words, "The term 'common carrier,' as used in this act, shall include express companies and sleeping-car

companies," it is to be presumed that they intended it to be read with the proviso as to passes, and that section 1, forbidding the issuance of railroad passes, except in specified cases, should not be construed to prohibit a railroad from giving a railroad pass in exchange for an express pass.

If express companies may not give employes passes to railroad companies they have nothing to exchange, and railroad companies can not give their passes to the officers and employes of express companies. This was not the intention of Congress, for it contemplated "the interchange of passes for the officers, agents, and employes of *common carriers*, and their families."

III.

The circuit court held that express companies are not at liberty to carry the personal packages of their employes free, or to exchange employes passes with other common carriers, because they are not specifically named in section 22, which provides that "nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes."

But this court has held that section 22 is only illustrative and not exclusive. When that section was adopted express companies were not subject to the act and were therefore not named, but when they were brought in by the amendment of June 29, 1906, they came within the spirit and principle of section 22, and also within the spirit and principle of the proviso in section 1, that "this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families," and within the spirit of the exemption in that section of the employes of railroad companies, and

their families, from the prohibition against free passenger transportation.

In Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company, 145 U. S. 263, 278, Mr. Justice Brown said:

"The unlawfulness defined by sections 2 and 3 consists either in an 'unjust discrimination' or an 'undue or unreasonable preference or advantage,' and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words, this section is rather illustrative than exclusive."

The circuit court in its opinion (R. 28) conceded that there is no just reason why express companies should not have the same liberty of issuing and interchanging employes passes, as railroad companies. If free service to the employes of railroad companies is not unjust discrimination neither is free service to the employes of express companies.

That express companies were first brought under the Interstate Commerce Act by the amendments of June 29, 1906, is shown by the following statement of District Judge Baker, giving the history of the subject in Southern Indiana Express Company vs. United States Express Company, 88 Fed. 659, 662; affirmed 92 Fed. 1022, 35 C. C. A. 172:

"At an early day the question was raised whether express companies were subject to the provisions of the interstate commerce act, and, after full argument and deliberate consideration, the interstate commerce commission unanimously decided that the act did not apply to express companies properly so termed; that is to say, to independent organizations that carried on an express or parcel business in the usual manner, and which did not operate railway

lines. In re Express Companies, 1 I. C. C. R. 349; 1 Int. Com. Rep. 677. This case was decided on December 28, 1887. The commission shortly thereafter called the attention of Congress to their ruling, and suggested such an amendment of the law as would place express companies within their jurisdiction; but, although more than 10 years have elapsed, Congress has taken no action on the subject. The same conclusion was reached in U. S. vs. Morsman, 42 Fed. 448. After a careful consideration of the question, I see no reason to doubt the correctness of the conclusions reached in these cases."

IV.

If Congress, in putting express companies under the Interstate Commerce Act, had intended to prohibit them from continuing their long established and well known practice of issuing passes to their employes and members of their families, and of exchanging employes passes with other express companies and railroad companies, the prohibition would have been stated in explicit language, and not left to inference. Congress had the question of free service before it in 1906 and discussed the subject at great length. The fact that it passed a law against free passenger service and said nothing on the subject of the free carriage of property, and that the employes of the carriers were exempted from the law that was passed, is an important circumstance in ascertaining the legislative intent, and inconsistent with the claim that Congress meant to prohibit employes express franks.

There had been no complaint against the free carriage of property, or any practice on the part of the railroads to carry property for the public free, and the Interstate Commerce Act was not passed for the purpose of remedying any evil in that connection. So far as the transportation of property is concerned, the public complaint was against discriminatory rates and secret rebates to favored shippers,

and the statute was aimed at those evils. It nowhere forbids the free carriage of property per se, nor indeed until the amendment of section 1 on June 29, 1906, was the free carriage of persons forbidden.

The Interstate Commerce Act does not purport to regulate all common carriers nor the carriers that are subject to the act in all of their relations. Section 6 declares "that wherever the word 'carrier' occurs in this act, it shall be held to mean 'common carrier.'" But the service which the express companies perform for the holders of employes passes is not that of common carrier, because it is gratuitous, and the holder is required to assume all risk of loss or damage from whatever cause, to the property carried.

Schouler on Bailments (3d ed.), Sec. 343, says:

"No one is to be designated as a common carrier in a particular case, unless he performed as a carrier for hire."

In Northern Pacific Railway Company vs. Adams, 192 United States, 440, it was held that a railroad company does not stand in the relation of a carrier for hire to the employe of another railroad, riding on a free pass, and is not responsible to the holder of the pass for injuries resulting from ordinary negligence.

Mr. Justice Brewer, citing and approving Baltimore and Ohio Southwestern Railway Co. vs. Voight, 176 U. S. 498, at p. 453, says:

"In the light of this decision but one answer can be made to the question. The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. . . . If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the

privilege offered, and having accepted that privilege can not repudiate the conditions. . . . So far as the element of contract controls it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

In Quimby vs. Boston & Maine Railroad, 150 Mass. 365, Mr. Justice Devens said:

"In such instances one who is ordinarily a common carrier does not act as such but is simply in the position of a gratuitous bailee. The definition of a common carrier, which is that of a person or corporation pursuing the public employment of conveying goods or passengers for hire, does not apply under such circumstances. The service which he undertakes to render is one which he is under no obligation to perform and is outside of his regular duties. In yielding to the solicitation of the passenger he consents for the time being to put off his public employment and do that which it does not impose upon him."

V.

But although employes express franks are not expressly prohibited by the Interstate Commerce Act, the question remains whether they violate sections 2, 3 or 6 of the act, or section 1 of the Elkins Act, which prohibit unjust discrimination and undue and unreasonable preference or advantage.

None of those sections were amended on that point by the act of June 29, 1906, and all of them apply equally to property and passengers. If, therefore, they prohibit free carriage of property per se, they also prohibit free carriage of passengers, and prohibited both prior to June 29, 1906. But the action of Congress, in passing the amendment of section 1, which prohibits free passenger transportation, and in postponing its operation for six months until January 1, 1907, is inconsistent with the claim that the thing thereby prohibited was already prohibited. On the contrary, the fair inference is that Congress under-

stood that free transportation of persons or property was not absolutely forbidden by sections 2, 3 or 6 of the Interstate Commerce Act, or by section 1 of the Elkins Act. None of those sections deals with free service. They all deal with service for compensation.

Section 2, defining unjust discrimination, makes it unlawful for a common carrier to "demand, collect, or receive from any person or persons a greater or less *compensation* for any service rendered," etc. This does not refer to gratuitous service, but to service for hire, where, "by any special rate, rebate, drawback or other device" a greater or less *compensation* is charged to one person than another.

The same is true of section 6, which requires carriers to file and publish their rates, and provides that they shall not "charge or demand or collect or receive a greater or less or different *compensation* for such transportation," than the rates so filed and published.

So by section 1 of the Elkins Act, which was not amended in this respect in 1906, it is made unlawful to offer, grant, give, solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property, "whereby any such property shall, by any device whatever, be transported *at a less rate* than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce, and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced." The language refers to carriage at rates, for hire. The words, "whereby any other advantage is given or discrimination is practiced," refer to the undue or unreasonable advantages, and the unjust discriminations forbidden by sections 2 and 3 of the Interstate Commerce Act.

Section 3 is a copy of the undue preference clause of the English Railway and Canal Traffic Act of 1854, sec. 2, which has been held to apply only where there is some sort

of competition between the parties complaining and those to whom an undue or unreasonable preference or advantage is claimed to have been given.

> Hozier vs. The Caledonian Railway Company, 1 Railway and Canal Traffic Cases, 27.
>
> Lees et al. vs. Lancashire and Yorkshire Railway Company, 1 Railway and Canal Traffic Cases, 352, 366.

In the first of the foregoing cases the petitioner, Hozier, who resided near Motherwell, which is on the Caledonian Railway between Edinburgh and Glasgow, and who had frequent occasion to travel between Motherwell and Edinburgh and Motherwell and Glasgow, complained that the rates charged between Edinburgh and Motherwell and Motherwell and Glasgow, as compared with the rates for passengers traveling through between Edinburgh and Glasgow, amounted to an undue and unreasonable preference in favor of such through passengers over the petitioner and others traveling between Motherwell and Edinburgh, or Motherwell and Glasgow, or intermediate places.

The Lord President delivering judgment dismissing the petition, said, at page 30:

"I put the question whether he [the petitioner] suffered any disadvantage by the proportional rating complained of; and the answer was, that he did not complain of any disadvantage, but that he did not choose that parties traveling from Edinburgh to Glasgow should enjoy the benefit of a cheaper rate of traveling than he himself could enjoy. It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preference to parties pari passu in the matter, but you must bring them into competition in order to give them an interest to complain."

In United States vs. Chicago & N. W. Ry. Co. 127 Fed. 785, the circuit court of appeals for the seventh circuit,

held that the refusal of the defendant to give the government, for the transportation of soldiers, the same rates that it gave to theatrical companies, etc., was not an unjust discrimination and did not subject the government to undue prejudice or disadvantage in violation of the Interstate Commerce Act. The decision was put on the ground that—

"The government of the United States, in the transportation of its soldiers, does not financially, or in any other manner, come in competition of any kind with any of the parties who are given the party rates provided for theatrical companies," etc.

The court said, at page 789:

"It is only unfair and unjust discrimination that the statute, as well as the common law, is aimed at. If two persons or corporations are engaged in the same business, and their situation is substantially alike, any discrimination in rates would be prohibited as invidious and unjust. It has always been held lawful at common law, and is so under the statute, to allow ministers of the gospel to travel on half-fare tickets. They do not come in competition with business men, and no injustice is done to anybody."

A member of the public who employs an express company as a carrier for hire, is not subjected to undue or unreasonable prejudice or disadvantage, within the meaning of section 3, because the company occasionally carries a personal package of an employe free, as an incident of his employment. It might as well be said that an employe who is not entitled to a frank, under the rules of the company, is subjected to undue or unreasonable prejudice and disadvantage, within the meaning of the Interstate Commerce Act, because an employe of a different grade or longer service gets a frank.

In Texas and Pacific Railway Company vs. Interstate Commerce Commission, 162 U. S. 197, the court said, p. 218:

"The very terms of the statute, that charges must be *reasonable*, that discrimination must not be *unjust*, and that preference or advantage to any particular person, firm, corporation or locality must not be *undue or unreasonable*, necessarily imply that strict uniformity is not to be enforced; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be considered by a tribunal appointed to carry into effect and enforce the provisions of the act." (The italics are in the opinion.)

In the circuit court the Government dwelt on the fact that in the Elkins Act, passed February 19, 1903, which is unchanged in that respect by the amendments of June 29, 1906, the word discrimination is used without the qualifying adjective "unjust," and the word advantage without the adjective "unreasonable." On that point the circuit court said (R. 22):

"It is contended by the Government that this omission discloses the intention on the part of Congress, 'to require common carriers in interstate commerce to publish and file schedules of rates, to adhere absolutely to such rates, and to grant no preferences or discriminations unless expressly authorized by the statute.' It may be doubted whether Congress intended by this language to broaden the prohibitions of the act in that respect. It is difficult to conceive of the term discrimination, prejudice, or disadvantage as not associated with what is unjust, unreasonable, and undue. It is true the adjectives are dwelt upon in the former decisions of the court with considerable emphasis. It hardly seems, however, as though their absence would have modified the opinion rendered in those cases. Webster defines the word 'discrimination,' with reference to railroads, as 'the arbitrary imposition of unequal tariff for substantially the same service,' investing it with the sense of unjustness and unfairness.

So far as appears, the supreme court has not had its attention called to the change, and has given it no construc-

tion. In Platt vs. LeCocq, 150 Fed. Rep. 391, the words 'prejudice and disadvantage' of the South Dakota statute were construed to mean unreasonable prejudice or disadvantage. In view of these considerations, and bearing in mind the general trend of the statute and amendments thereof, there seems to be no sufficient basis for the construction of the Elkins Act asked for by the Government in that respect."

The purpose of the Elkins Act was to prescribe penalties and supply remedies for the better and more effectual enforcement of the Interstate Commerce Act. It had been found difficult to secure convictions against employes of carriers, who alone were made criminally liable by the Interstate Commerce Act, and so by the Elkins Act the carriers themselves were made equally liable with their officers and employes for that which prior thereto was a misdemeanor only as against the individual; and the shippers were also brought in, and the soliciting, accepting or receiving of rebates, concessions or discriminations in any form, or by any device, was made an offense equally with the offering, granting or giving thereof. But all had relation to the unjust discrimination and the undue and unreasonable advantages forbidden by the Interstate Commerce Act.

VI.

The free carriage of persons or property may be a cloak for a rebate, or, under certain circumstances, an unlawful discrimination, in violation of the statute. But it is impossible for the Government to maintain that the issuing of employes passes in good faith by express companies is unjust discrimination or unreasonable advantage, within the prohibition of the statute, in the face of its explicit declarations concerning passes issued by railroad companies to the same class of persons, for the same reasons, and under similar circumstances.

The case of the express companies is not substantially

different from that of the railroad companies, for they are engaged in "a sort of partnership relation in carrying on a common carrier business," and the court should not make a distinction between them in the absence of clear and specific language in the statute, especially as the practice which the circuit court has enjoined was lawful at common law, is beneficial to the express companies in the conduct of their business, and is not injurious to the public.

Section 22 does not, in affirmative terms, give railroads the right to issue employes passes. It says only that "nothing in this act *shall be construed* to *prevent*" them from doing so. But if nothing in the act is to be construed to prevent railroads from issuing and exchanging employes passes, nothing therein can properly "be construed" to prevent express companies from doing the same thing, for there is no substantial difference between them, and the court has said that the section is "rather illustrative than exclusive."

In Durousseau vs. United States, 6 Cranch, 307, 314, Chief Justice Marshall said:

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent."

The words are quoted with approval in the Paquete Habana, 175 U. S. 677, 685, and in Glover vs. United States, 164 U. S. 297, Mr. Justice White said:

"The law must be interpreted in accordance with its spirit so as to effectuate the purpose intended to be accomplished thereby."

In Cincinnati, New Orleans & Texas Pacific Railway Company vs. Interstate Commerce Commission, 162 U. S. 184, 197, and on several occasions since then (200 U. S. 554; 209 U. S. 119), the court has quoted with approval the fol-

lowing words of Justice Jackson, when circuit judge, in the case of the Interstate Commerce Commission vs. Baltimore & Ohio Railroad Company, 43 Fed. 37, which was affirmed by this court, 145 U. S. 263:

"Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the Act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits."

We respectfully submit that the decree should be reversed and the case remanded with directions to dismiss the petition.

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MATERIAL SECTIONS OF THE STATUTES.

Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379.

SECTION 1. This section was amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, by adding the following:

The term "common carrier" as used in this Act shall include express companies and sleeping car companies.

Also by adding the following:

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employes and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary caretakers of live stock, poultry and fruit; to employes on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employes, post-

office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employes of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offence, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.

SECTION 2. [Never amended.] That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of un-

just discrimination, which is hereby prohibited and declared to be unlawful.

SECTION 3. [Never amended.] That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

SECTION 6. This section was amended March 2, 1889, c. 382, 25 Stat. 855, and June 29, 1906, c. 3591, 34 Stat. 584. After providing for the filing and publishing of rates, and the method of changing them, it declares:

Up to June 29, 1906.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any servi-

As amended June 29, 1906.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act: nor shall any carrier charge or demand

ces in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, that wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

SECTION 22. [As amended March 2, 1889, and February 8, 1895. Not amended by the Act of June 29, 1906.] That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United

States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes; etc. [The words after the last semicolon have never been amended].

Elkins Act, February 19, 1903, c. 708, 32 Stat. 847.

SECTION 1. [As amended June 29, 1906. The additions made by that amendment are in brackets.] That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such cor-

poration, would constitute a misdemeanor under said acts or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts or by this act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offence; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation [whether carrier or shipper], who shall [knowingly], offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not

less than one thousand dollars nor more than twenty thousand dollars: etc.

SECTION 3. [Never amended.] That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction, etc.